

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,149

ROBERT E. WYNGAARD,

Appellant,

v.

ROBERT F. KENNEDY,
Attorney General of the United States,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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District of Columbia Circuit

STATEMENT OF QUESTIONS PRESENTED

1. Whether the term, crime involving moral turpitude, contained in the deportation statute [8 U.S.C. 1182(a)(9)] is sufficiently definite to encompass misconduct known as disorderly conduct in New York [Penal Law Section 722(8)], even though such misconduct is designated by the State of New York as a minor offense and is less important than a misdemeanor, does not entitle the defendant to a jury trial, and where other criminal safeguards or consequences do not apply to such offenses? If the deportation statute embraces such offenses as crimes involving moral turpitude, is an attack upon the statute as unconstitutional upon the void for vagueness doctrine so clearly lacking in substance that appellant was properly denied the convocation of a three judge district court?

2. Whether the District Court below was correct in following the ruling of the Second Circuit in United States v. Flores-Rodriguez, 237 F.2d 405 (C.A. 2, 1956), and Babouris v. Esperdy, 269 F.2d 621 (C.A. 2 1959), that the determination whether an offense is a "crime" is a federal question and is not to be decided by reference to the law of the state, in view of the contrary rulings in Pino v. Nicolls, 119 F.Supp. 122, 125 (D. Mass.), aff'd. 215 F.2d 237, cf. 243 (1st Cir.), reversed sub. nom. Pino v. Landon, 349 U.S. 901; Holzapfel v. Wyrsh, 259 F.2d 890 (3rd Cir.) (1958); and United States ex rel. Freislinger v. Smith, 41 F.2d 707 (7th Cir.) (1930)?

3. Where the appellant, a native of Holland and a permanent resident of the United States since 1948, was convicted in 1955 for the offense of disorderly conduct in New York in violation of Section 722(8) of the New York Penal Law, was his conviction for a crime involving moral turpitude under 8 U.S.C. 1182(a)(9), and was he, therefore, deportable pursuant to 8 U.S.C. 1251(a)(1) for having been in the excludable class at the time of his reentry as a returning resident in 1957?

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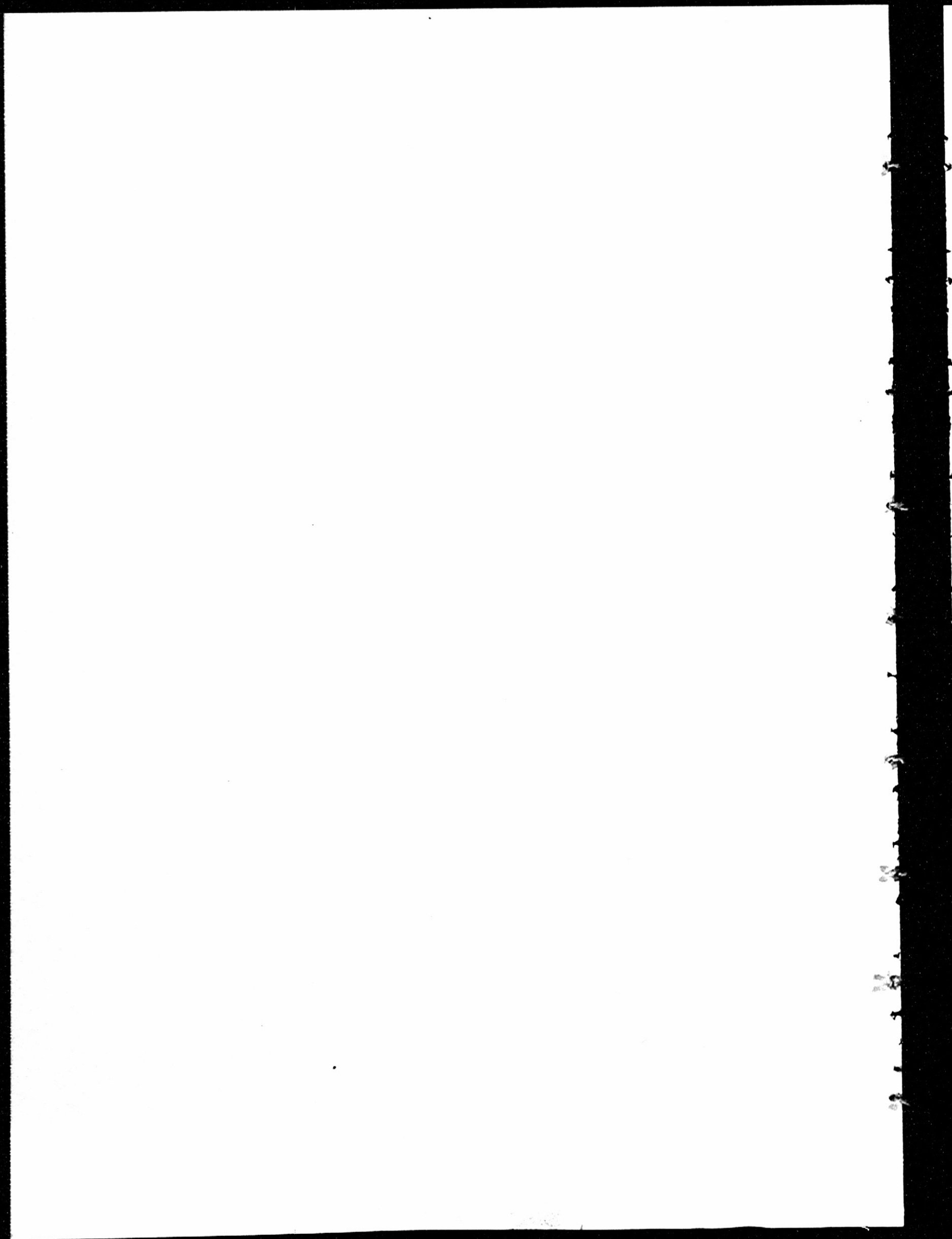
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UNITED STATES COURT OF APPEALS
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No. 16,149

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Appellant,

v.

ROBERT F. KENNEDY
Attorney General of the United States,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order granting summary judgment for defendant below entered on October 4, 1960. The jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U.S.C. 2201) and the Administrative Procedure Act (5 U.S.C. 1009). This Court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant, a native and citizen of Holland, has maintained a residence in the United States since his lawful admission in 1948. In 1957 he was readmitted as a lawfully returning resident. In 1952 he was convicted of petty larceny in New York and paid a fine of \$50.00. In 1955 he was found guilty of disorderly conduct in violation of the New York Penal Section 722(8) and received a ninety day sentence. (Par. 2-7 of the complaint, admitted by answer, J.A. 1-2).

Deportation proceedings were instituted in 1957 upon the ground that appellant was excludable at the time of his 1957 reentry in that his 1955 disorderly conduct violation was a crime involving moral turpitude. A single petty crime involving moral turpitude may be waived under 8 U.S.C. 1182(a). Accordingly, the petty larceny charge would not result in deportation. Only if the disorderly conduct offense of 1955 is a crime involving moral turpitude, is appellant's deportation required. This appellee conceded below. This was the basis for the order of deportation herein by the Board of Immigration Appeals (J.A. 14).

Prior to December, 1955, the consistent administrative construction of the New York Penal Law, Disorderly Conduct, Section 722(8), was that the offense was not a crime involving moral turpitude. (Answer, Par. 11, J.A. 5). The change in this construction resulted in the deportation proceedings and order herein.

Appellant contended below that he was not deportable upon the following grounds:

1. That insofar as applied to him, the statute is unconstitutional for vagueness. As application was made for injunctive relief, request was made for the convening of a three judge district court pursuant to 28 U.S.C. 2282 and 2284. This request was denied by order dated June 30, 1960 (J.A. 12).

2. That disorderly conduct is not a crime in New York and accordingly he may not be deported on this charge.

3. That his offense does not involve moral turpitude.

Cross motions for summary judgment were made below after the District Court had denied the motion for the convening of a three judge district court and on October 4, 1960, judgment was rendered in favor of the appellee (J.A. 18).

STATEMENT OF POINTS

1. A disorderly conduct violation in New York under Section 722(8) of its Penal Law is not a crime under the law of the State of New York.

2. The jurisdiction or state where an offense is committed determines whether it is a crime or a noncriminal violation.

3. A disorderly conduct violation in New York under 722(8) of its Penal Law is not an offense involving moral turpitude.

4. The deportation statute, 8 U.S.C. 1251(a), insofar as it requires deportation for the New York offense of disorderly conduct, is void for vagueness.

5. Appellant is not subject to deportation for his offense of disorderly conduct in New York.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act (8 U.S.C. 1251) provides:

"(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who —

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

Section 212(a)(9) of the Immigration and Nationality Act [8 U.S.C. 1182(a)(9)] provides:

"Sec. 212(a) The following classes of aliens shall * * * be excluded from admission into the United States:

"(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense)
* * * ."

Section 4 of the Act of September 3, 1954 [8 U.S.C. 1182(a)] provides:

"Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of Section 1 (3) of Title 18 (U.S.C.), by reason of the punishment actually imposed * * * may on and after September 3, 1954 * * * be * * * admitted to the United States if otherwise admissible; Provided, That the alien has committed only one such offense."

Section 1, Title 18 U.S.C., provides:

"Offenses classified.

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense."

Article 2 of the New York Penal Law provides:

"Division of Crime. A crime is: 1. A felony; or 2. A misdemeanor. Felony. A 'felony' is a crime which is or may be punishable by 1. Death; or 2. Imprisonment in a state prison. Misdemeanor. Any other crime is a 'misdemeanor'."

Section 722 of the New York Penal Law provides:

DISORDERLY CONDUCT

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

- "1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
- "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to other;
- "3. Congregates with others on a public street and refuses to move on when ordered by the police;
- "4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;
- "5. Shouts or makes a noise outside or inside a building during the night time to the annoyance or disturbance of any considerable number of persons;
- "6. Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag;
- "7. Stations himself on the public streets or follows pedestrians for the purpose or soliciting alms, or who solicits alms on the public streets unlawfully;
- "8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;
- "9. Causes a disturbance in any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;
- "10. Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;
- "11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts.
- "12. In any prosecution under subdivision eleven of this section the fact the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an unlawful purpose."

SUMMARY OF ARGUMENT

The threshold question is whether the court below had jurisdiction to dispose of the complaint in view of the substantial question of the constitutionality of the statute as applied to plaintiff. The term crime involving moral turpitude has been saved from infirmity for vagueness only when it has been applied with specificity to crimes and to such crimes as to which there is no doubt as to turpitude. In the instant case, however, the term has been applied to an offense, which, in terms, under the relevant state procedure is not a crime, to a conviction for disorderly conduct, and to a specific act of loitering in a public place soliciting for the purpose of committing a crime against nature or other lewdness.

In this context, there can be no question that there is substantial doubt as to whether the statutory term is void for vagueness, and there being a substantial constitutional question, the issue on the merits should have been resolved by a three-judge court, rather than by the court below.

Apart from the jurisdictional question, the Court below erred in ruling that whether an offense is a crime is to be determined by a federal standard rather than by the law of the place of the offense. The decisional law and the statutory scheme in New York, the place of the offense here, establish that the present offense is analagous to violations of municipal ordinances, and is not regarded as a crime.

In any event, the offense here is that of disorderly conduct. It has been universally settled in deportation decisions that the specific conduct of the offender is not determinative of the question whether the offense embraces moral turpitude. Inasmuch as a person not guilty of turpitudinous conduct may offend a prohibition against disorderly conduct, it is error to hold the appellant guilty of a crime involving moral turpitude.

Even if, contrary to appellant's position, the offense be regarded as loitering in a public place soliciting from a crime against nature and other lewdness, it does not necessarily constitute turpitudinous conduct. For lewdness may embrace innocuous conduct which, if performed publicly, violates a prohibition against lustful or lascivious behavior, which may be neither "vile" nor "depraved".

In the proceedings below, the appellee and the court looked to appellant's specific conduct, an act of fellatio, to find his offense as one involving moral turpitude. This was error. But even so, in view of the fact that consensual homosexual behavior is not a crime universally or in the District of Columbia, that in the light of current knowledge as to the etiology of such conduct, it is not regarded as necessarily vile or depraved, and the fact that under the New York law the offense here is regarded as merely a minor breach of the public peace, the appellant's conduct may not be held to be a crime involving moral turpitude. This is so especially in the construction of a deportation statute, when the narrowest of the alternative meanings of words must be adopted.

ARGUMENT

I

IN VIEW OF THE SUBSTANTIAL NATURE OF THE CONSTITUTIONAL
ISSUE PRESENTED, THE CAUSE SHOULD BE REMANDED FOR THE
CONVENING OF A THREE JUDGE COURT

In the recent case of Wolf v. Boyd, No. 16,944 (C.A. 9, February 1, 1961), the Ninth Circuit Court of Appeals declared the judgment of the District Court void and ruled that there was no jurisdiction over the appeal, where the District Court improperly denied a motion for the convocation of a three judge court. The threshold question here is whether the appellant's challenge of the constitutionality of his deportation order raises a question substantial enough to require the convening of a three judge court. In the words of the Supreme Court, a question is to be regarded as insubstantial if:

"its unsoundness so clearly appears from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Hannis Distilling Co. v. Mayor and City Council of Baltimore, 216 U.S. 285, 288 (1910).

Appellant has been ordered deported as the result of a conviction for disorderly conduct in New York City in 1955. From 1917 to December, 1955, the immigration officials did not consider this to be a crime involving moral turpitude. Since that time they have changed their minds.

This is a deportation case, even though the ground is that the appellant was excludable at the time of his reentry in 1957. As a resident alien, appellant is entitled to constitutional protection, Japanese Immigrant Case, 189 U.S. 86; Chew v. Colding, 344 U.S. 590 (1953). Appellant can only be deported if the standard of proscribed conduct is sufficiently definite to avoid the void for vagueness infirmity. This is settled by Jordan v. De George, 341 U.S. 223 (1951). Both the term "crime" and

the term "moral turpitude" must be sufficiently definite in the phrase "crime involving moral turpitude". We think that if the appellee's construction is adopted designating the offense of disorderly conduct, especially when applied to an act of "lewdness", as a crime involving moral turpitude, then the statute as applied here to appellant is void for vagueness.

A. Legislative History of Phrase, Crimes Involving Moral Turpitude. The legislative history of the term, moral turpitude, indicates it was never intended to apply to minor offenses, such as disorderly conduct. The term, moral turpitude, first appeared in the exclusion provisions of the immigration statute in the Act of March 3, 1891 (26 Stat. 1084). The accompanying report (House Report 3808, 51st Cong., 2d Sess., p. 2) stated that the bill barred:

"persons who have been convicted of felony or other infamous crimes."

The Government in its Supreme Court brief in Jordan v. DeGeorge (p. 6) suggests, as did the Congress passing the 1917 Immigration Act (Senate Report No. 352, 64th Cong., 1st Sess., p. 15), that crimes involving moral turpitude are "serious penal offenses".

B. Legislative History of the Term "Offense". As originally proposed to Congress in S. 3455, 81st Congress, Section 212(a)(10) [8 U.S.C. 1182(a)(10)], would have excluded aliens who committed two "crimes". The General Counsel of the Immigration Service (File No. 56190/113 - comments on S. 3455 (on file in Supreme Court Library) stated to Congress with reference to this section and the use of the word "crimes" as follows:

"It is reasonable to anticipate litigation and controversy concerning the meaning of the word 'crimes' as used here, particularly since, in some jurisdictions, some violations of law may not be considered crimes, such as violations of municipal ordinances, traffic laws, or offenses involving juveniles. It is not clear whether the bill intends that

a violation of any statute, law, or ordinance, for which a sentence of confinement is possible, is to be considered a 'crime' within the meaning of this section."

Thereafter, the word "offense" was inserted in the revised version of the proposed bill, S. 716, 82nd Cong., 1st Sess., at Section 212(a)(10).

In its analysis of the substituted language, which it had proposed, the Immigration and Naturalization Service declared [Analysis of S. 716, Section 212(10)] (on File U.S. Supreme Court Library):

"The use of the word 'offenses' instead of 'crimes' is obviously intended to overcome the necessity to determine whether certain convictions, in fact, constitute crimes. This paragraph is apparently intended to have the effect of excluding from the United States those aliens who are repeated law violators, regardless of the gravity of the offenses for which they were convicted * * *."

While the language proposed for what has become 8 U.S.C. 1182(a)(10) was broadened, the statutory language for the provisions under which the appellant's deportation is now sought was tightened. The previous statute, the Immigration Act of 1917, 39 Stat. 875, provided, in the comparable section, for the exclusion of persons who have been convicted of a:

"felony or other crime or misdemeanor involving moral turpitude." 8 U.S.C. 136(e).

The original draft of the proposed legislation, S. 3455, with its subsequent revisions in S. 716, H.R. 5678, 82nd Cong., 1st Sess., and S. 2550, 82nd Cong., 2nd Sess., each provided for exclusion solely for crimes involving moral turpitude, thus eliminating the previous reference to misdemeanors, and making no provision whatsoever for the lesser violations known as offenses. The statute was enacted in this form. See 8 U.S.C. 1182(a)(9).

In these circumstances, the use of the word "crime" in Section 212(a)(9) and the deliberate change to the word "offense" in the succeeding section should foreclose reading it by implication into the section from which it is absent.

As Mr. Justice Holmes said in United States v. Atchison T. & S.F.R. Co., 220 U.S. 37 (1910):

"The presence of such a provision in one part and its absence in the other is an argument against reading it as implied. * * * We see no reason to suppose that Congress meant more than it said."

C. Nature of the Appellant's Offense. We leave to later discussion whether the appellant's misconduct in 1955 was an offense or a crime. It suffices here to note that he was not convicted for sexual deviation but for disorderly conduct. People v. Feliciano, 173 N.Y.S. 2d 123 (1958).

In New York, disorderly conduct under Section 722 of the Penal Law has always been considered a minor offense, below misdemeanors in the statutory scheme.

"These minor offenses, below the grade of misdemeanors, have always constituted a class by themselves." People v. Wilder, 255 N.Y.S. 218, 221-222 (1932).

"Elsewhere the offense has been discredited as petty, quasi-criminal, or a lesser offense not amounting to a misdemeanor." People ex rel. Stolofsky v. Superintendent, 259 N.Y. 115, 119 (1932).

Disorderly conduct in New York "is any conduct as in the opinion of the magistrate tends to a breach of the peace": People v. Squires, 135 Misc. 214, 238 N.Y. Supp. 151 (1929). This is indeed an indefinite criterion upon which to base deportation. It is complicated by the conflict of New York cases as to whether the offense may be committed in a private place and, if a public place is required, the definition of an alleged public place. See Disorderly Conduct in New York Penal Law 722, 25 Brooklyn Law Rev. 46 at 54-56 (1958).

D. The Deportation Statute as Construed and Applied to Appellant To Require His Deportation for the Offense of Disorderly Conduct in New York, a Minor Non-Criminal Offense, Is Void For Vagueness. We submit that if the word crime includes non-criminal offenses, as contended by the Government, that the word is indeed vague. We further submit that if

"crimes involving moral turpitude" encompass acts designated by the State of New York as disorderly conduct and "a minor offense below the grade of misdemeanor" (People v. Wilder, 255 N.Y.S. 218), then the term is void for vagueness.

From the earliest use of the term moral turpitude in the immigration statutes, its meaning has been considered vague. In U.S. ex rel. Mylius v. Uhl, 203 Fed. 152, aff'd. 210 Fed. 860 (1914), the lower court observed:

"'Moral turpitude' is a vague term. Its meaning depends to some extent upon the state of public morals."

In 43 Harvard Law Review 117 (1929) (written as an undergraduate by Federal Judge Charles Wyzanski, Jr.), it was said:

"Men who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture. And the loose terminology of moral turpitude hampers uniformity; it is anomalous that for the same offense a person should be deported or excluded in one circuit and not in another."

The lack of a consistent workable definition of "moral turpitude" and its vagueness is demonstrated by the decided judicial and administrative cases. Manslaughter may not involve moral turpitude. Mongiovi v. Karnuth, 30 F.2d 825 (W.D. N.Y., 1929). Mailing a lewd or obscene letter (Matter of D., 1 I & N Dec. 190), being a lewd person (Matter of G-R, 5 I & N Dec. 18), desertion from the armed forces (Matter of S.B., 4 I & N Dec. 682), violation of the narcotic laws [Andreacchi v. Curran, 38 F.2d 498 (S.D. N.Y., 1926)], and a Mann Act violation (Matter of R., 6 I & N Dec. 444), are all declared not to involve moral turpitude. All these are declared crimes (some are felonies) and hardly of the inconsequential character of a New York disorderly conduct offense.

It is indeed a standard lacking in precision which declares these enumerated offenses free of moral turpitude, but permits disorderly conduct, for which no more than six months imprisonment may be imposed, and declared no crime by the State, to be held "a crime involving

moral turpitude". Moreover, if moral turpitude inheres in the intent, Meyer v. Day, 54 F.2d 336 (C.A. 2, 1931), how can it be said that intent to provoke a breach of peace is the type of intent that produces a finding of moral turpitude?

For years, the instant offense was held to be one which did not involve moral turpitude. (Lewis v. Frick, 189 Fed. 146, C.C. E.D. Mich., 1911; Board of Immigration Appeals File 56138/190, May 13, 1944; Matter of F-R, 7 I & N Dec. at 814, Dec. 20, 1955.) Today, the rule is otherwise. The state of public morals have not changed since 1955 in such a manner as to warrant the transformation of this offense from one not involving moral turpitude to one which does. If anything, public morality has gone the reverse way. We submit, therefore, that the administrative reversal after some thirty years of describing the instant offense as one not involving moral turpitude and the vagueness of the standard applied in the light of Jordan v. De George, presents a substantial basis for attacking the constitutionality of the statute and a three judge district court should have been convened below. This court, therefore, lacks jurisdiction to review the merits but should reverse the decision below with directions to convoke a three judge court to determine the substantial constitutional questions presented.

II

APPELLANT'S MISCONDUCT WAS THE OFFENSE OF DISORDERLY CONDUCT AND WAS NOT A CRIME WARRANTING DEPORTATION

In the Federal immigration statute under consideration [8 U.S.C. 1182(9)], an alien must be convicted of a crime before he may be deportable or excludable. The issue is whether conviction of an offense in New York under Section 722 of its Penal Law is a conviction for such a crime. Whether violation of Section 722 is "quasi-criminal in nature", in "nature as misdemeanors" is no answer to the problem. In 8 U.S.C. 1182(a)(9) Congress did not proscribe quasi-crimes, or violations in nature of crimes — it made crimes the sole basis for deportation and exclusion.

Appellee and the Court below relied upon the Second Circuit cases of Babouris v. Esperdy, 269 F.2d 621 (C.A. 2, 1959), cert. denied 362 U.S. 913, and United States v. Flores-Rodriguez, 237 F.2d 405 (C.A. 2, 1956), which were said to hold disorderly conduct offenses in New York deportable crimes upon the following conclusion:

1. The Federal Courts interpret the immigration statutes and decide whether a person was convicted of a crime - not the state courts. This is done in the interest of uniformity.

2. Disorderly conduct in New York is treated as an offense and not as a crime purely for procedural or jurisdictional reasons.

(a) Whether Conduct is Criminal in a State is Determined by Local Law and Not by Federal Law. The first conclusion is clearly erroneous and in conflict with decisions of the United States Supreme Court, the Third and the Seventh Circuits. Pino v. Nicolls, 119 F.Supp. 122 (D. Mass.), aff'd. 215 F.2d 237 (1st Cir.), sub nom. Pino v. Landon, 347 U.S. 901 (1955). Holzapfel v. Wyrsh, 259 F.2d 890 (3rd Cir., 1958). U.S. ex rel. Freislinger v. Smith, 41 F.2d 707 (7th Cir., 1930).

In the Pino case, the alien was held deportable by the District Court which "look(ed) to the law of Massachusetts for the purpose of determining whether or not the history of this case * * * reveals a conviction" and found that there was such a conviction, 119 F.Supp. at 125-126. The Court of Appeals affirmed, stating that the "meaning of the word 'convicted' is a federal question * * *." The Supreme Court reversed, ruling that "on the record" there was not a final conviction. 349 U.S. 901. The record established that under Massachusetts law the alien's sentence had been revoked and the case "placed on file". See 119 F.Supp. at 125. Accord: Holzapfel v. Wyrsh, 259 F.2d 890 (3rd Cir., 1958), and United States ex rel. Freislinger v. Smith, 41 F.2d 707 (7th Cir., 1930), and Ex Parte Isojoki, 22 Fed. 151 (N.D. Cal., 1915).

The reasons for this rule are made clear by the Supreme Court in Rochen v. California, 342 U.S. 165, 168:

"In our federal system the administration of criminal justice is predominantly committed to the care of the states. * * * Broadly speaking, crimes in the United States are what the laws of the individual states make them. * * *"

Thus, the primary requisite of deportability is that the alien must have committed a crime at the place where the offense occurred. Ex Parte Isojoki, 222 Fed. 151 (N.D. Cal., 1915). Ex Parte Rocha, 30 F.2d 823 (S.D. Texas, 1929). Lady Cathcart committed adultery in South Africa where such conduct was not a crime. It could not bar her entry into the United States. (10 Misc. Dockets, S.D. N.Y., 335, 1926; New York Times, February 10 and March 6, 1926.) Where a person is convicted of juvenile delinquency, he is not barred or deported because of such conduct even if it be homicide or sexual deviation. He has committed no crime. 2 I & N Dec. 368 (1948); 6 I & N Dec. 835 (1955). Similarly, a person convicted of a violation of a sex offenders' statute, not being a penal offense, has not committed a crime under the local law. Holzapfel v. Wyrsh, supra. The law's uniformity does not require all state laws to be alike but merely that the state law define the conduct as a crime.

(b) In New York Disorderly Conduct is Not a Crime. Under Federal law and under New York law an "offense" and a "crime" are not synonymous terms.

1. We have shown that Congress itself used "offense" to encompass crimes and other violations of Section 212(a)(10) of the Immigration and Nationality Act [8 U.S.C. 1182(a)(10)]. It is, therefore, of much broader reach than the term crimes in the paragraph of the statute here involved [8 U.S.C. 1182(a)(9)].

2. The term offense includes non-criminal violations in other Federal statutes. In United States v. Witherspoon, 110 F.Supp. 364, 366 (E.D. Tenn., 1953), the District Court recognized the applicability under federal law of the term "offense" to non-criminal proceedings. The Court said, referring to the term offense in 18 U.S.C. 3287:

"It is not by its language restricted to offenses which provide a criminal penalty. Indeed, when it uses the word 'offense', it makes no distinction between offenses which carry criminal penalties and those which carry civil sanctions."

This is in conformity with the views expressed by 14 Am. Jur., p. 754, where it is stated:

"The word 'crime' of itself includes every offense from the highest to the lowest 'misdemeanors', as well as treasons and felony. However, it does not necessarily include certain quasi-criminal acts or 'offenses', such as violations of military rules and regulations which are merely disciplinary in their nature or the violation of municipal ordinances where the act is not made a crime by the general law of the state or by virtue of the authority delegated by the state to the municipal corporation. In other words, all crimes are offenses, but all offenses are not necessarily crimes."

See also: McClain v. United States, 224 F.2d 522 (C.A. 5, 1955), holding that police court convictions for violations of city ordinances are not convictions for crimes.

3. In New York State, as under federal law and under the immigration statute, the term offense is of greater breadth than the term crime and encompasses non-criminal and quasi-criminal conduct.

Disorderly conduct was not a common law crime. People v. Kaufman, 1 N.Y.S. 2d 362 (1937), 27 C.J.S. 2d, p. 507. We must, therefore, look to some statute for its proscription.

"The term 'disorderly conduct' is now commonly used, however, sometimes in statutes, but more often in municipal ordinances, to designate certain minor offenses, below the grade of misdemeanors, which are quasi-criminal in nature, but not strictly criminal." 27 C.J.S. 2d, pp. 507-8.

The New York cases repeatedly state that disorderly conduct under Penal Law Section 722 is not a crime, but an offense.

An offense does not carry with it the stigma of a crime. The Definition of an Offense in New York Penal Statutes, 26 Fordham Law Review 113, 117 (1957). Under the New York Penal Law Article 2, all crimes, as in our federal statute (18 U.S.C. 1), are divided into felonies and misdemeanors. Violation of Section 722 is neither a felony or misdemeanor. A 1955 law (N.Y. Sess. Laws, 1955, C. 272, No. 1) refers to disorderly conduct "or any other offense not constituting a crime". In reviewing the cases which follow, moreover, we should remember that:

"The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." Morissette v. United States, 342 U.S. 246, 263 (1951).

In People v. Gilbert, 12 N.Y.S. 2d 632 (1939) the court said:

"In law felonies and misdemeanors are crimes, while disorderly conduct is classified as an offense, as to which the City Magistrate has plenary jurisdiction."

In People v. Wilder, 255 N.Y.S. 218, 221-222 (1932), the court said:

"These minor offenses below the grade of misdemeanors have always constituted a class by themselves."

From People v. McCarthy, 67 N.Y.S. 2d 560, 563 (1947), we hear:

"A charge of disorderly conduct under the provisions of Section 722 of the Penal Law is defined as an 'offense' and not a crime."

People v. Sly, 180 Misc. 96, 98; 39 N.Y.S. 2d 474, 477 (1942), says:

"The violation of Section 722 of the Penal Law is not a 'crime' but merely an 'offense' so defined in the section itself."

Steinert v. Sobey, 14 App. Div. 505, 508 (1897) says:

"It thus appears that however inaccurate or illogical the distinction may be, summary proceedings for petty offenses leading to disorder have been considered not as prosecutions for crimes but offenses against police regulations."

People v. Fuerst, 34 N.Y.S. 1115, 1117 (1895), states:

"It is true that some of the specified acts which bring the alleged offender within the definition of a 'disorderly person' constitute positive crimes, such as common gambling and the keeping of bawdy houses, and render him amenable to prosecution therefor * * * but in such cases he is to be arrested and prosecuted in the usual and ordinary mode provided by law where a felony or misdemeanor has been committed."

See also: Lippert v. State, 139 N.Y.S. 2d 751, 752 (1955).

If the federal judiciary may create the New York crime of disorderly conduct, it may make a crime of juvenile delinquency, civil nonsupport, paternity proceedings and the entire run of offenses heretofore considered non-criminal.

As a disorderly conduct offense is neither a felony or misdemeanor in New York, the accused is not entitled to a jury trial. People v. Kelly, 273 N.Y.S. 992 (1934). This offense may not be used to impeach the credibility of a witness as it is not a crime. McQuade v. City of New York, 136 N.Y.S. 2d 111 (1954). See also McClain v. United States, 224 F.2d 522 (C.A. 5, 1955), and 26 Fordham Law Rev. 113 (1947). There is no requirement of corroboration of an offense since it is not a crime. People v. Ericson, 13 N.Y.S. 2d 997, 1005 (1939). Finally, a person may not be convicted of conspiracy to incite disorderly conduct as disorderly conduct is not a crime. People v. Kaufman, 1 N.Y.S. 2d 363 (1937). In the latter case the court said:

"It is important to note that the legislature labeled disorderly conduct as an 'offense' whereas every other section in the Penal Law defining a crime provides that a violation thereof is either a felony or a misdemeanor. * * * On principle and in the light of these authorities, disorderly conduct as defined by section 722 of the Penal Law is not a 'crime' within the meaning and intent of the Penal Law * * *."

III

APPELLANT'S OFFENSE DOES NOT INVOLVE MORAL TURPITUDE

A. The Offense Defined by Section 722 of the New York Penal Law is Not Lewdness but Disorderly Conduct.

The statute states that persons who commit certain proscribed acts listed in twelve separate paragraphs "with intent to provoke a breach of the peace":

"shall be deemed to have committed the offense of disorderly conduct."

In People v. Feliciano, 173 N.Y.S. 2d 123 (1958), the defendant was charged with violation of Section 722(8) by reason of soliciting a policeman to commit sodomy. The court said:

"I am granting the motion to dismiss this complaint because this defendant is not charged with sexual deviation, not with indecency or lewdness. He is charged with disorderly conduct which can only occur if and when the defendant acts with intent to provoke a breach of the public peace or behaves in a manner whereby the public peace is breached or may be breached."

The court stated further:

"The disorderly conduct statute is concerned exclusively with preservation of the public peace. * * * The statute is not aimed at sex deviation as such — . . ."

Moral turpitude depends on the criminal intent required to sustain a conviction. U. S. ex rel. Mongiovi v. Karnuth, 30 F.2d 825 (W.D. N.Y., 1929); Meyer v. Day, 54 F.2d 336 (C.A. 2, 1931); U.S. ex rel. Shladzien v. Warden, 45 F.2d 204 (E.D. Pa., 1930).

Here, the controlling intent necessary for conviction is intent to commit a breach of the peace. The type of conduct is immaterial if committed in the privacy of one's home, if it does not tend to a breach of the peace. Moral turpitude must be evaluated without regard to the details of a person's misconduct. Guarino v. Uhl, 107 F.2d 399 (C.A. 2, 1939).

As has been noted above (p. 13), disorderly conduct or breach of the peace traditionally has not been held to involve moral turpitude. Lewis v. Frick, 189 Fed. 146 (C.C. Mich., 1911), reversed on other grounds, 195 Fed. 693 (C.A. 6, 1912), 233 U.S. 291 (1926). The crime here as defined by statute was disorderly conduct and not sexual deviation. It, therefore, did not involve moral turpitude.

B. Appellant's Offense May Not be Deemed to Involve Moral Turpitude Because the Acts Proscribed by Subsection 8 of Section 722 Of the New York Penal Code Do Not Under Any and All Circumstances Carry That Taint.

But even if his offense, as appellee urged below, were that of "frequent(ing) or loiter(ing) about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" (Section 722(8) New York Penal Law), it cannot be said with any certainty that this involves moral turpitude.

In Ablett v. Brownell, 99 U.S. App. D.C. 387, 389, 240 F.2d 625, 627, this Court recognized the rule that:

"Moral turpitude must be inherent in, or an essential ingredient of, the crime. If a person not guilty of moral turpitude may nevertheless be convicted of the crime, the offense cannot be said to involve moral turpitude for purposes (of the predecessor statute) irrespective of whether or not the conduct of the particular alien whose deportation is sought was immoral." (Citing cases.)

Apart from the additional constitutional problem which is raised by an attempt to define a "crime against nature or other lewdness",¹ the offense here reaches "any person" who, with or without an intent

¹ Cf. Winters v. New York, 333 U.S. 507. Appellant has been unable to find a construction of the term by the New York courts. Lewdness, however, is generally defined as lustful, lascivious, or libidinous conduct. 53 C.J.S. 4. A "crime against nature" presumably is a sexual act other than coitus, but whether such acts are necessarily against "nature" is open to doubt. See Karpman, *The Sexual Offender and His Offenses*, pp 296, and Ploscowe, *Sex Offenses: The American Legal Context*, XXV Law and Contemporary Problems 217 (Spring, 1960).

to provoke a breach of the peace, merely requests an act of lewdness. Such an act may range the spectrum of sexual behavior from "heavy necking" to fornication, exhibitionism, voyeurism, homosexual activity, as well as deviant forms of heterosexual relations. See Robert Veit Sherwin, Sex and the Statutory Law; Ploscowe, Sex Offenses: The American Legal Context, XXV Law and Contemporary Problems 217 (Spring, 1960); Model Penal Code, American Law Institute, Tent. Draft No. 4, Article 207 (1955).

If a conviction may be had under Section 722(8) of the New York Penal Code for lewd "heavy necking", which we assume to be the least socially-offensive conduct enumerated, and surely, though libidinous and perhaps lustful, without the taint of moral turpitude, then under the rule noted in the Ablett decision, appellant's offense, regardless of the nature of his own conduct, cannot be held to be turpitudinous. Contrary to this rule, the appellee below (P & A 4, 9, 10) looked to the appellant's specific conduct, an act of fellatio, to find upon the authority of United States v. Flores-Rodriguez, 237 F.2d 405 (2nd Cir.), supra, and Babouris v. Esperdy, 269 F.2d 621 (2nd Cir.), cert. denied, 362 U.S. 913, supra, that his offense involved moral turpitude, and the District Court so found.

However, even as to this holding, reliance upon these authorities is misplaced for two reasons. First. The question whether homosexual conduct meets the test of moral turpitude was not challenged in either of those cases. The sole issue raised in each case was whether an offense under Section 722 is a crime, under 8 U.S.C. 1182(a)(9), the aliens and the government each appearing to "concur" that it was merely an offense, although involving moral turpitude, and not a crime (at 409).

The language in Flores-Rodriguez which described homosexual behavior as "repugnant to the mores of our society" (411) and as " * * * most emphatically not socially approved * * *" (412) is directed not to the statutory phrase relating to moral turpitude but refers rather, over the dissent of Circuit Judge Frank (at 412), to the bar against the admission of "mentally defective aliens". (411).

Second. The precise holding in those cases is that the alien's false statements (concealing convictions under Section 722(8) of the New York Penal Law) were "material because (they) choked off a line of investigation which might well have resulted in (their) valid exclusion from the United States". (412).

All that can be read into the rulings in these decisions, therefore, is that a false statement is material if it thwarts an investigation of a doubtful application for an immigration visa. This is the reading which this court previously has given the Flores-Rodriguez decision in Ablett. See 99 U.S. App. D.C. at 392, 240 F.2d at 630. The Babouris decision is no different.

C. In Any Event, Homosexual Conduct Does Not Involve Moral Turpitude.

Appellant urges, as an open question,² if his specific conduct is to be determinative of the issue whether he has committed a deportable offense, that homosexual behavior does not involve moral turpitude.

While there is controversy as to whether homosexuality is a congenital anomaly,³ a psychiatric disorder,⁴ constitutional⁵ or acquired,⁶ a normal but sometimes retarded phase of sexual development,⁷ a "matter very largely of taste",⁸ or "nature's manner of providing an outlet

² Cf. Kelly v. United States, 90 U.S. App. D.C. 125, 194 F.2d 150, which perhaps assumes but does not decide the issue.

³ See generally, Karpman, Sexual Offender and His Offenses, pp. 620-679; and Friedman, Sexual Deviations, Handbook of Psychiatry, pp. 588-607; Kraepelin, Clinical Psychiatry (1907) as to congenital origin.

⁴ Stekel, Homosexual Neurosis; Bergler, Homosexuality: Disease or Way of Life.

⁵ Hirshfield, Sexual Anomalies and Perversions.

⁶ Ellis, Studies in the Psychology of Sex.

⁷ Freud and Fliess, "Nosology of Male Homosexuality" in Contributions to Psychoanalysis; Pollens, The Sexual Criminal.

⁸ Judge Learned Hand, Statement on voting against punishment of Sodomy, American Law Institute Proceedings, p. 129, May, 1955.

for the male's stronger sexual impulses and thus "indispensable to the constitution of a well-regulated society",⁹ current thinking among the authorities seems unanimous that consensual homosexual relations among adults is not an activity which society should punish.¹⁰ Homosexuality is no crime in the District of Columbia. Rittenour v. District of Columbia, ___ A.2d ___ (D.C. Mun. App. 1960), 88 WLR 1409, 1413 (Sep. 20, 1960).

If homosexual conduct in itself is not even a crime, the question then is whether such conduct merely because committed in a public place is to be regarded, under the test required for a turpitudinous act, as "necessarily so base and shameful as to leave the offender not wanting in * * * depravity * * *." (Menna v. Menna, 70 U.S. App. D.C. 13, 14; 102 F.2d 617, 618.

It is significant in this connection that the offense of which the appellant was charged in Section 722(8) of the New York Penal Code is directed only to a breach of the public peace. In People v. Harvey, 307 N.Y. 588, 590, 591, 123 N.E. 2d 81 (1954), the New York Court of Appeals stated in reference to this statute which denominates the forbidden conduct as an "offense", that its "substance * * * is that the acts charged must be such as are public in character and breach the public peace, or tend so to do * * *." As to "acts which are 'seriously' disturbing to, or which seriously endanger, the public peace, (the legislature has made) misdemeanors by another statute (Penal Law, Section 43)."

⁹ Andre Gide, Journals, p. 117; and Corydon generally, Cf. Kinsey, et al., infra.

¹⁰ Wolfenden Report on Homosexual Offenses and Prostitution, Ref. No. CMND 247, Her Majesty's Stationery Office, September, 1957; Hartwell, Citizen's Book of Sexual Abnormalities, Governor's Study Commission on Deviated Sex Offender, Michigan, 1950; Sutherland, Journal of Criminal Law and Criminology, Jan.-Feb. 1950, pp. 543-544; Wile, Sex Offenders and Sex Offenses, J. Crim. Psychopath, July, 1941, 11-31; Bowman and Engle, Psychiatric Evaluation of Laws on Homosexuality, 29 Temple Law Quarterly, 273-336 (Spring, 1956). But cf. Leviticus 20:15-16 which regards homosexual relations as an "abomination" punishable by death, and St. Paul's Epistle to the Romans; Romans 1:18 ff. For a scholarly treatment of religious view of homosexuality, see Derrick S. Bailey, Homosexuality and the Western Christian Tradition. Views as to what is moral, however, have been said by this Court to be relative and changing. See Parmelee v. United States, 72 U.S. App. D.C. 203, 113 F.2d 729, and Kinsey, et al., Sexual Behavior in the Human Male, supra.

The New York legislature, in the view of the highest court of that State, has thus termed the offense of which the appellant was convicted as merely a breach of the public peace, and one which in the statutory scheme is not viewed as "serious".

Emotionalism apart, it seems clear that an act which if performed in privacy is not even a crime, and which when committed in public is no more than a minor breach of the public peace, cannot be described as a "crime involving moral turpitude" for the purpose of deporting a lawfully resident alien from the United States.

The cautionary approach to the construction of the statute here is reinforced by the requirements imposed by Fong Haw Tan v. Phelan, 336 U.S. 6, 10; Barber v. Gonzalez, 347 U.S. 637, 642-643; Jordan v. DeGeorge, 341 U.S. 223, and approved by this Court in Ablett v. Brownell, 99 U.S. App. D.C. 390, 240 F.2d at 628, that the narrowest meaning should be ascribed to the words used by Congress.

CONCLUSION

For the reasons set forth above, the narrowest meaning of the term "crime involving moral turpitude" requires a decision that the appellant's offense is not within the compass of the statute.

Respectfully submitted,

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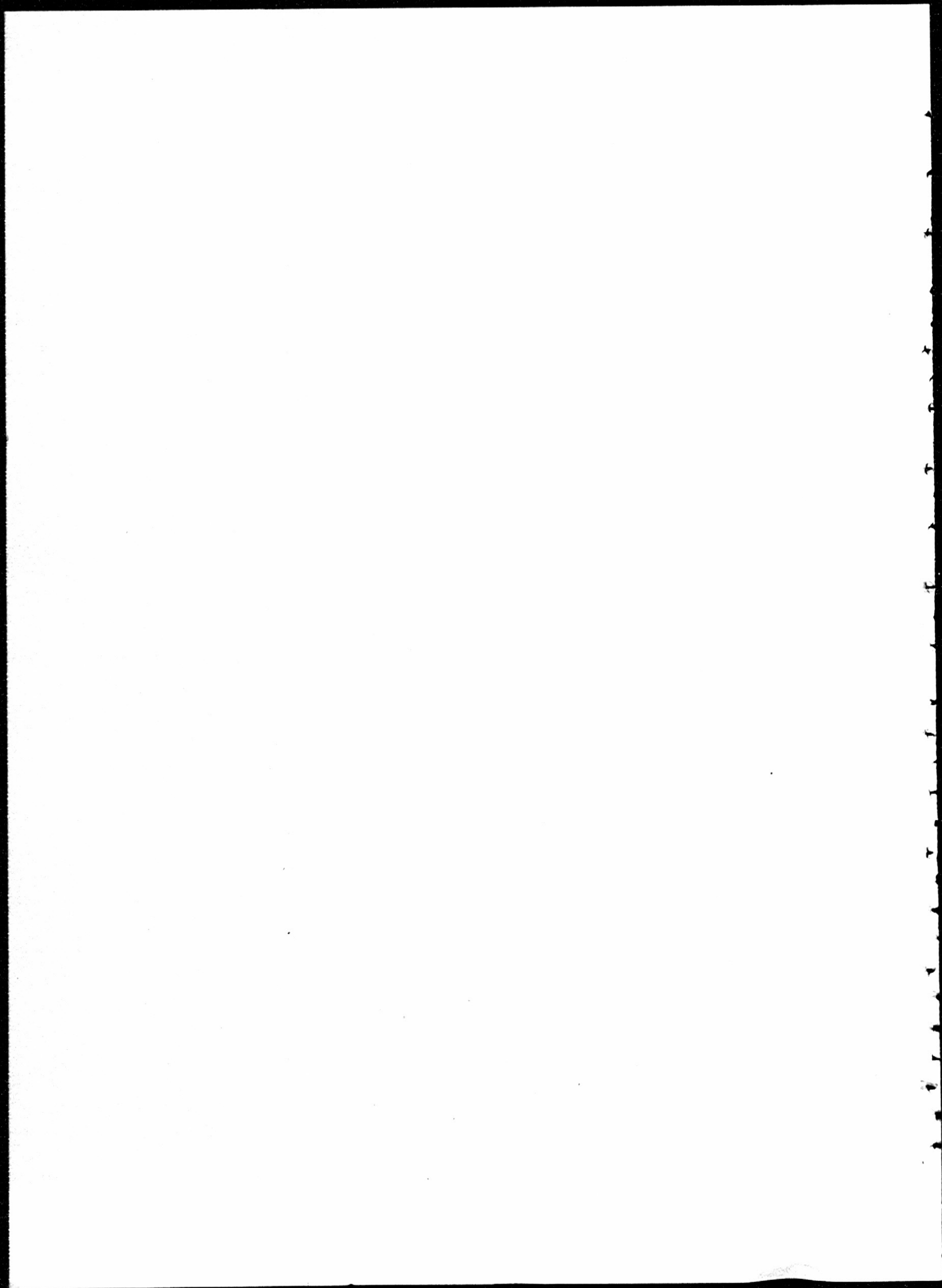
HYMAN MARGOLIES, ESQUIRE

Of Counsel

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JOINT APPENDIX

[Filed Nov. 19, 1959]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT E. WYNGAARD	:	
341 East 54th Street	:	
New York, New York,	:	
Plaintiff,	:	Civil Action No. 3267-'59
v.	:	Action for Declaratory Judgment
	:	
WILLIAM P. ROGERS	:	
Attorney General of the	:	
United States,	:	
Defendant.	:	

COMPLAINT

The plaintiff respectfully alleges:

1. This is an action for declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001).
2. The plaintiff is a native of Holland and a national of the Netherlands who lawfully entered the United States for permanent residence on April 2, 1948. He has maintained his residence here ever since.
3. The defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be excluded or deported from the United States, and he supervises the administration of the Immigration and Naturalization Service and the Board of Immigration Appeals.
4. The plaintiff last entered the United States on May 13, 1957, when he was admitted as a lawfully returning resident of the United States.
5. On April 4, 1952, plaintiff was convicted in New York City for petty larceny and fined fifty dollars.

6. On April 27, 1955, in New York City, plaintiff was committed for ninety days for disorderly conduct in violation of Section 722, Subsection 8, of the Penal Laws of New York.

7. Pursuant to a final decision of the Board of Immigration Appeals dated November 29, 1957, plaintiff has been found deportable from the United States pursuant to 8 U.S.C. 1251(a)(1) and 1182(a)(9) by reason of the foregoing offenses of petty larceny and disorderly conduct, the Board holding that both of said offenses are crimes and that both involve moral turpitude.

8. If the aforesaid offense of disorderly conduct is not a crime or does not involve moral turpitude, plaintiff would not be subject to deportation for his crime of petty larceny, in view of 8 U.S.C. 1182(a) (Public Law 770, 83rd Cong.) which authorizes the waiver of a single petty offense by the Board of Immigration Appeals or the Attorney General.

9. Under the Immigration and Nationality Act, whether an offense is a crime is determined by the law of the place where the offense is committed.

10. The plaintiff violated the disorderly conduct statute (Penal Law, Section 722) of the law of the State of New York.

11. For a number of years prior to 1956 the Board of Immigration Appeals held that a violation of Section 722 of the Penal Law of New York was not a crime. Around 1956 the Board reversed its position and now holds that it is a crime.

12. Under the statutory laws of the State of New York and pursuant to the decisions interpreting Section 722 of the Penal Laws of the State of New York disorderly conduct as defined by Section 722 is not a crime.

13. Disorderly conduct in violation of New York law does not involve moral turpitude.

14. Plaintiff is not subject to deportation by reason of his disorderly conduct in the City and State of New York.

15. As construed and applied by defendant, the Immigration and Nationality Act requiring plaintiff's deportation for the offenses set forth

herein is vague, void, unconstitutional and in violation of the Fifth Amendment to the Constitution.

16. Defendant is threatening to deport plaintiff and unless restrained will do so causing him irreparable injury.

WHEREFORE, Plaintiff requests judgment:

(a) Declaring that he is not subject to deportation for his offense of disorderly conduct in New York.

(b) Declaring that plaintiff is not subject to deportation.

(c) Declaring the Immigration and Nationality Act as construed and applied to plaintiff is vague, void, unconstitutional and in violation of the Fifth Amendment to the Constitution.

(d) Restraining defendant from apprehending and deporting plaintiff.

/s/ JACK WASSERMAN

/s/ DAVID CARLINER

Attorneys for Plaintiff
902 Warner Building
Washington, D. C.

HYMAN MARGOLIES, ESQUIRE
Of Counsel

[Filed January 12, 1960]

ANSWER

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, defendant avers as follows:

1. Admitted.
2. Admitted on information and belief.
3. Admitted.

4. Admitted.

5. It is admitted and averred that on April 4, 1952, plaintiff was convicted in the State of New York of the crime of petty larceny for which he received a sentence of fifty (\$50.00) fine or five days in jail and thirty days imprisonment, the sentence being suspended only as to the thirty days imprisonment.

6. It is admitted that plaintiff on April 17, 1955, was convicted of disorderly conduct in the State of New York under Section 722, Subsection 8 of the Penal Law of New York for which he was sentenced to serve a term of ninety days in jail.

7. It is admitted and averred that the Board of Immigration Appeals, pursuant to its final decision dated November 29, 1957, upheld the decision and order of a Special Inquiry Officer, entered on August 27, 1957, finding plaintiff deportable and ordering the latter to be deported from the United States pursuant to Sections 241(a)(1) and 212(a)(9) of the Immigration and Nationality Act of 1952 (8 USC §§ 1251(a)(1) and 1182(a)(9)) by reason of the aforesaid convictions of petty larceny and disorderly conduct; and that such Board and Special Inquiry Officer found, in their respective decisions, that each of the aforesaid convictions was for a crime involving moral turpitude. It is further averred that there were at least two additional convictions of plaintiff for disorderly conduct, but that they were not necessary to and did not form a part of or basis for the deportation decision and warrant.

8. Denied, except insofar as it is admitted as follows: Plaintiff's petty larceny conviction of April 4, 1952, is a violation falling within the purview of the Act of September 3, 1954, 8 U.S.C. § 1182(a). If such conviction under the New York Penal Law should remain the sole crime which may be considered in plaintiff's case (by virtue of a ruling herein that violation of Section 722, Subsection 8, of the New York Penal Law was not a "crime" within the meaning of the immigration statutes), plaintiff would not be deportable.

9. Denied, except insofar as it is admitted as follows: It is true that the offensive conduct for which plaintiff was convicted must constitute a crime where committed in order to be considered a crime under the immigration statutes; but the fact that the violation constituted by such conduct has been described as an "offense" rather than a "crime" in order to comply (as in this instance) with local jurisdictional requirements will not preclude its classification under the immigration statutes as a crime for deportation purposes when (as here) a criminal violation is actually involved.

10. Admitted.

11. In answer to paragraph 11 of the Complaint, defendant admits and avers as follows: As of December 20, 1955, the Board of Immigration Appeals had been holding that conviction for violation of Section 722, Subsection 8, of the New York Penal Law did not render an alien excludable on criminal grounds. After the decision of the Second Circuit in United States v. Flores-Rodriguez, 237 F.2d 405, such Board reversed itself, giving as its reason therefor the Flores-Rodriguez decision and the comments made therein that denomination of a violation as an "offense", rather than as a "crime", for the purpose of determining local jurisdiction should not control the interpretation or construction of an immigration statute of the United States.

12, 13, 14, 15 and 16. Denied.

/s/ OLIVER GASCH
United States Attorney

/s/ EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ JOHN F. DOYLE
Assistant United States Attorney

/s/ HAROLD D. RHYNEDANCE, JR.
Assistant United States Attorney

[Filed April 28, 1960]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the defendant by and through his attorney, the United States Attorney, and respectfully moves this Court to grant summary judgment in his favor on the ground that there exists no factual issue, and defendant is entitled to judgment as a matter of law.

Incorporated herein and made a part hereof by reference is the certified pertinent record of the Immigration and Naturalization Service relating to plaintiff, bearing Immigration and Naturalization Service file No. A-6907296. This record is marked (for identification purposes only) as Government's Exhibit A.

In support of this motion, a Memorandum of Points and Authorities is herewith submitted.

/s/ OLIVER GASCH
United States Attorney

/s/ EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ JOHN F. DOYLE
Assistant United States Attorney

/s/ GIL ZIMMERMAN, Special
Assistant United States Attorney

[Filed May 4, 1960]

**PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT
AND PERMANENT INJUNCTION AND APPEARANCE
IN OPPOSITION TO DEFENDANT'S MOTION**

Comes now plaintiff and appears in opposition to defendant's motion for summary judgment and cross-moves for summary judgment upon the ground that no factual issues are presented and plaintiff is entitled to judgment as a matter of law. A permanent injunction is sought restraining defendant from enforcing the statute herein [8 U.S.C. 1251(a)(1) and 1182(a)(9)] against plaintiff upon the ground that as construed and applied

to him it is unconstitutional and void for vagueness as alleged in the complaint herein.

/s/ JACK WASSERMAN

/s/ DAVID CARLINER

Attorneys for Plaintiff

* * *

[Filed May 4, 1960]

REQUEST FOR THREE JUDGE COURT

Comes now the plaintiff herein and upon the complaint, his motion for a permanent injunction restraining the enforcement of the immigration statute herein upon the ground of unconstitutionality, suggests to the Court the necessity of convening a three judge court pursuant to 28 U.S.C. 2282 and 2284.

/s/ JACK WASSERMAN

/s/ DAVID CARLINER

Attorneys for Plaintiff

* * *

[Filed May 13, 1960]

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST
FOR CONVENING A THREE-JUDGE DISTRICT COURT
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

Comes now the defendant by and through his attorney, the United States Attorney, and opposes plaintiff's suggestion to the Court of the necessity to convene a three-judge District Court pursuant to 28 U.S.C. 2282 and 2284. Defendant further opposes plaintiff's cross-motion for summary judgment.

In support of this opposition, a Memorandum of Points and Authorities is herewith submitted.

/s/ OLIVER GASCH
United States Attorney

/s/ EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ JOHN F. DOYLE
Assistant United States Attorney

/s/ GIL ZIMMERMAN, Special
Assistant United States Attorney

[Filed June 30, 1960]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court, June 28, 1960. Plaintiff was represented by his counsel, Jack Wasserman, Esq., and David Carliner, Esq. Defendant was represented by his counsel, Gil Zimmerman, Special Assistant U.S. Attorney. Upon application of plaintiff's counsel, the hearing was limited solely to the request of plaintiff for the convocation of a Three-Judge District Court pursuant to the provisions of 28 U.S.C. 2282 and 2284 (to pass upon the constitutionality of Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9) on its face and as applied in plaintiff's deportation case), and defendant's opposition thereto.

The Court, having considered the pleadings, the memoranda filed by counsel, the certified administrative record and the oral argument made by counsel, and being fully advised in the premises, entered its oral decision denying plaintiff's request June 28, 1960.

WHEREUPON, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

Plaintiff is a male alien, a native of Holland, and a national of the Netherlands. He originally effected entry into the United States for permanent residence on April 2, 1948. His last entry to the United States

was made on May 13, 1957, when he was readmitted to the United States at San Antonio, Texas as a returning resident alien.

II

Prior to his aforesaid last entry, plaintiff was convicted of petit larceny on April 4, 1952 in the Court of Special Sessions of the City and County of New York. He was again convicted on April 17, 1955 in the City Magistrate's Court of the City of New York, Felony Court, Borough of Manhattan, of "disorderly conduct" in violation of Section 722, subdivision 8, of the New York Penal Law, on an information charging that plaintiff and another male co-defendant, with intent to provoke a breach of peace, while acting in concert, did loiter in a public place for the purpose of soliciting men for crimes against nature or other lewdness, and did there and then commit the following act:

. . . While standing at adjacent urinals each manipulating his naked penis, . . . did . . . step back from the urinals, faced each other, . . . [plaintiff's co-defendant] thereupon [. . . being observed to reach out with his right hand and manipulate the naked penis of . . .] [plaintiff] . . . , and then bend down and placed his mouth in the proximity of . . . [plaintiff's] . . . naked penis, the latter offering no resistance to the described acts of . . . [plaintiff's co-defendant].

The aforesaid act is within the specific proscription of subdivision 8, Section 722, New York Penal Law.

III

Plaintiff has been found deportable, and a final administrative order has been entered directing his deportation pursuant to law, on the ground that at the time of his last entry in 1957 he was excludable from the United States under Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9), which bars aliens who have been convicted of a "crime involving moral turpitude." The Immigration authorities determined in this connection that both of the criminal offenses described in II above are "crimes involving moral turpitude" within the meaning of the aforesaid excluding provision in the immigration law.

IV

Plaintiff contends that the phrase "crime involving moral turpitude", as it appears in Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9), does not have a sufficiently definite meaning to afford a valid constitutional standard for deportation, and that on its face and as applied in his case this statutory provision is so indefinite in meaning as to be constitutionally "void for vagueness". Plaintiff in substance advances the following further contentions (which are not now before this Court for decision, except to the extent they need be considered in relation to his request for the convocation of a Three-Judge District Court):

(1) His aforesaid 1955 conviction of the offense of "disorderly conduct" in violation of Section 722, subdivision 8, of the New York Penal Law for loitering in a public place in order to solicit men for the purpose of committing a crime against nature or other lewdness is not a "crime involving moral turpitude" within the meaning of the aforesaid excluding provision in the immigration law;

(2) Therefore, on the administrative record now before the Court, he is excludable for only one "crime involving moral turpitude" within the meaning of the aforesaid excluding provision in the immigration law, i.e., his 1952 conviction of "petit larceny", which he concedes is such a "crime involving moral turpitude";

(3) However, this conviction of "petit larceny" is a conviction of a misdemeanor classifiable as a "petty offense" under the provisions of 18 U.S.C. 1(3), and under the amendatory immigration legislation, Section 4 of the Act of September 3, 1954, 8 U.S.C. 1182a (1958 Ed.), he is to be regarded as having committed only one "petty offense" constituting a "crime involving moral turpitude";

(4) Hence, the aforesaid amendatory immigration legislation relieves him from excludability at the time of his last entry because of conviction of a "crime involving moral turpitude," and he was not then excludable under any other provision of the immigration law.

(5) Consequently, he is not now subject to deportation pursuant to law.

CONCLUSIONS OF LAW

I

Although the Immigration and Nationality Act is not a criminal statute, its provisions are subject to test (as settled by Supreme Court decision, Jordan v. DeGeorge, 341 U.S. 223, 231 (1951)) — at least where deportability is involved — to determine whether they violate constitutional due process of law under the established criteria of the "void for vagueness" doctrine.

II

But the decision of the Supreme Court in Jordan v. DeGeorge, supra, 341 U.S. at 229-32, has conclusively settled that the phrase "crime involving moral turpitude," as it appears in the deportation provisions in the immigration law, has a sufficiently definite meaning to afford a valid constitutional standard, and is not constitutionally "void for vagueness."

III

The particular application of the phrase "crime involving moral turpitude" to plaintiff's case is in any event not a borderline or marginal application of the phrase and, even if it were, decisions of the Supreme Court have clearly settled that difficulty of application in a borderline or marginal case does not make a sufficiently clear statutory standard so indefinite in meaning to warrant striking the statute down as constitutionally "void for vagueness."

IV

Consequently, plaintiff here presents no substantial Federal constitutional issue such as would warrant convening a Three-Judge District Court to consider plaintiff's application for an injunction restraining the enforcement, operation, or execution of the Act of Congress here challenged for repugnance to the Constitution.

/s/ LEONARD P. WALSH
United States District Judge

Dated: June 30, 1960

[Filed June 30, 1960]

ORDER

This matter having come on for hearing before the Court June 28, 1960; plaintiff being represented by his counsel, Jack Wasserman, Esq., and David Carliner, Esq.; defendant being represented by his counsel, Gil Zimmerman, Special Assistant U.S. Attorney; the hearing being limited upon application of plaintiff's counsel solely to the request of plaintiff for the convocation of a Three-Judge District Court pursuant to the provisions of 28 U.S.C. 2282 and 2284, and defendant's opposition thereto; the pleadings, the memoranda filed by counsel, the certified administrative record and the oral argument made by counsel having been considered; and the Court, being fully advised in the premises, having heretofore entered its oral decision denying plaintiff's request, and having made and entered its Findings of Fact and Conclusions of Law, NOW, THEREFORE, it is on this 6th day of June, 1960:

ORDERED, that petitioner's request for convocation of a Three-Judge District Court pursuant to the provisions of 28 U.S.C. 2282 and 2284 be and hereby is denied; and

FURTHER ORDERED, that this action proceed on to final judgment before an appropriate single District Judge.

/s/ LEONARD P. WALSH
United States District Judge

[Filed September 30, 1960]

RULING

THE COURT (J. Holtzoff:) This is an action for a declaratory judgment to review an order of the Attorney General directing the deportation of the plaintiff on the ground of convictions of crimes involving moral turpitude. The facts are not in dispute and only a question of law is involved. Both sides move for a summary judgment.

One of the convictions on which the deportation order is predicated is a conviction in New York State under Section 722 of the New York Penal

Law, on a charge of frequenting or loitering about any public place soliciting men for the purpose of committing a crime against nature or other lewdness. This offense is denominated in New York Penal Law as disorderly conduct.

New York Statutes distinguish between crimes and offenses and the violation of law involved in this case is classified as an offense. It is argued on behalf of the plaintiff that the conviction on this charge cannot be regarded as a conviction of a crime involving moral turpitude under the Deportation Statutes.

This precise question has been before the 2d Circuit which held in two cases that a conviction under this New York Statute is a conviction of a crime involving moral turpitude. *Babouris versus Esperdy*, 269 Federal Second, 621, and the *United States versus Flores-Rodriguez*, 237 F.2d 405 and 409. The Second Circuit very cogently argues that what constitutes a crime involving moral turpitude is a federal question and is not dependent on the manner in which state law classifies the violation of law. It is not the nomenclature or the label attached by state codes that governs but the nomenclature and the definitions of the federal statutes.

The Court is convinced by the reasoning of the Second Circuit and will follow the conclusion reached by that eminent Court. Under the circumstances this Court concludes that the plaintiff's conviction to which reference has been made is a conviction of a crime involving moral turpitude, and for that reason on the record in this case the plaintiff is deportable.

Plaintiff's motion for summary judgment will be denied and the defendant's motion granted.

You may submit your order.

EXCERPTS FROM GOVERNMENT EXHIBIT A

Part of Exhibit 2 in Deportation Hearing

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No. - A-6907296

New York District

In re: EMILE WYNGAARD a/k/a ROBERT EMILE WYNGAARD
IN DEPORTATION PROCEEDINGSIn behalf of Government: ALLAN A. SHADER
Examining OfficerIn behalf of Respondent: MR. HYMAN MARGOLIES, Esq.
32 Court Street
Brooklyn, New York

CHARGES:

O.S.C. - Section 241(a)(1) I & N Act - Excludable at entry,
Section 212(a)(9) I & N Act - Convicted of
crime involving moral turpitude - Petty
Larceny and Disorderly Conduct

Lodged - None

APPLICATION: Termination of proceedings

ORDER TO SHOW CAUSE - Served August 15, 1957

ORAL DECISION of SPECIAL INQUIRY OFFICEREntered on August 27, 1957

DISCUSSION:

The respondent by Counsel has conceded that he is an alien, a native of Holland, a national of The Netherlands, who last entered the United States at San Antonio, Texas, on May 13, 1957, being admitted for permanent residence as a returning resident. It has also been conceded that on April 4, 1952, following a plea of guilty before the Court of Special Sessions of the City of New York, County of New York, he was convicted of the commission of the crime of Petty Larceny and received a sentence of \$50. fine or five days in jail and 30 days suspended sentence. It has further been conceded that he was on April 17, 1955 in the Felony Part of the City Magistrates' Court of the City of New York, County of New York, convicted of violation of Section 722, Subsection 8 of the Penal Law of the State of New York, and sentenced to serve a term of 90 days in jail.

These conceded facts are contained in Findings of Fact 1 through and including 6, contained in the Order To Show Cause. Counsel for the respondent concedes that the crime of Petty Larceny involves moral turpitude, but challenges deportability on the charge set forth in the Order To Show Cause on the theory that the respondent comes within the scope of Public Law 770, and that the petty larceny aforementioned may be considered to be a "petty offense" within the meaning of the law, rendering the respondent not deportable at this time. It is Counsel's position that the conviction of violation of Section 722, Subsection 8, is not conviction of crime but merely conviction of "an offense" under the laws of the State of New York and it is his position, therefore, that the respondent is a person who has been convicted on only one occasion of the commission of crime involving moral turpitude. Unfortunately for this position the United States Court of Appeals for the Second Circuit in October of 1956 in the case of Roberto Flores-Rodriguez determined that, even though the State of New York for certain procedural purposes referred to Section 722 as an offense, within the meaning of the term "crime" as contemplated by The Congress in enacting the immigration laws, Section 722 was a "crime" under the immigration laws. I must therefore find, contrary to Counsel's position, that the respondent is a person who was convicted on more than one occasion of the commission of crime involving moral turpitude. I might state that the Circuit Court had before it a completely similar conviction, a conviction under Section 722, Subsection 8 of the Penal Law of the State of New York, and I will not therefore discuss at this time independently of the Court's Decision whether the crime involved moral turpitude. That is an adjudicated matter.

Since the respondent has been convicted on more than one occasion of the commission of a crime involving moral turpitude, he may not receive the benefit of Public Law 770, and it may not be found that he is not deportable as charged in the Order To Show Cause. The Government has established its case. The respondent is deportable upon the charge set forth in the Order To Show Cause. There is no application for relief

from deportation before me, and deportation must therefore be ordered. The Netherlands have been selected as the country of deportation if deportation is ordered. I therefore set forth the following Findings of Fact and Conclusion of Law on the issue of deportability, and upon the entire record my Decision as follows:

FINDINGS OF FACT as to DEPORTABILITY:

At this time I adopt and incorporate by reference Findings of Fact 1 through and including 6 contained in the Order to Show Cause.

CONCLUSION OF LAW as to DEPORTABILITY:

At this time I adopt and incorporate by reference Conclusion of Law contained in the Order To Show Cause.

ORDER:

IT IS ORDERED that the respondent be DEPORTED from the United States, pursuant to law, on the charge set forth in the Order To Show Cause.

WILLIAM FLIEGELMAN
Special Inquiry Officer

WF:EZ

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

File: A-6907296 - New York

In re: EMILE WYNGAARD aka ROBERT EMILE WYNGAARD
IN DEPORTATION PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT: Hyman Margolies, Esquire
32 Court Street
Brooklyn 1, New York

CHARGES:

Order: Section 241(a)(1) - I&N Act [8 USC 1251(a)(1)] -
Convicted of crime involving moral turpitude
Petty Larceny and Disorderly conduct.

Lodged: None.

APPLICATION: Termination of proceedings.

The matter is before us on appeal from an order of the Special Inquiry Officer holding that the respondent is deportable on the charge contained in the Order to Show Cause.

The respondent is a native of Holland and a national of The Netherlands, who last entered the United States at San Antonio, Texas on May 13, 1957 at which time he was admitted for permanent residence as a returning resident alien. On April 4, 1952 he was convicted of the commission of the crime of petty larceny and received a sentence of \$50 fine or five days in jail and 30 days suspended sentence. On April 17, 1955 he was convicted in the State of New York of a violation of Section 722, Subsection 8 of the Penal Law of the State of New York and he was sentenced to serve a term of 90 days in jail. On these two convictions rest the charge contained in the Order to Show Cause.

Counsel on appeal has conceded that the first conviction was for a crime involving moral turpitude but he has argued that the second conviction under Section 722, Subsection 8 of the New York Penal Law is not a conviction of a crime but rather is a conviction of an "offense" under the law of the State of New York.

We hold that counsel's contention in this regard has no merit in view of the decision of the Circuit Court of Appeals in the case of Roberto Flores-Rodriguez, 237 Federal Reporter 2nd 405. In that case the court held that a conviction under Section 722, Subsection 8 of the New York Penal Law is a crime as contemplated by Congress at the time the Immigration and Nationality Act of 1952 was enacted. Our Interim Decision, No. 880 In the Matter of F-, further serves to answer the argument of counsel on this particular point. In that decision we referred to the Flores-Rodriguez case and stated:

We believe it is significant that the court observed that under New York law disorderly conduct had been denominated as an "offense," that is, neither a "crime" nor a "misdemeanor," apparently for the purpose of determining or defining the jurisdiction of the inferior courts. The court further observed that the definition of the term "crime" by New York courts does not control in the interpretation of an act of Congress when interpreting and applying the immigration laws.

We conclude that the above decisions contemplate the proper interpretation of the point made by counsel. Accordingly, the following order will be entered.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.
Chairman

[Filed October 4, 1960]

JUDGMENT

This cause having come before the Court on cross-motions for summary judgment; argument of counsel having been heard; and the Court, upon due deliberation, having considered the record and having rendered its oral decision that there is no issue as to any of the facts and that defendant is entitled to judgment as a matter of law,

It is on this 4th day of October, 1960,

ORDERED, ADJUDGED and DECREED:

(1) That defendant's motion for summary judgment be and hereby is granted; and

(2) That plaintiff's motion for summary judgment be and hereby is denied, and his action dismissed.

IT IS FURTHER ORDERED, that the Clerk of Court return to the United States Attorney the certified record of the Immigration and Naturalization Service relating to the plaintiff and filed in this cause.

/s/ ALEXANDER HOLTZOFF
Judge

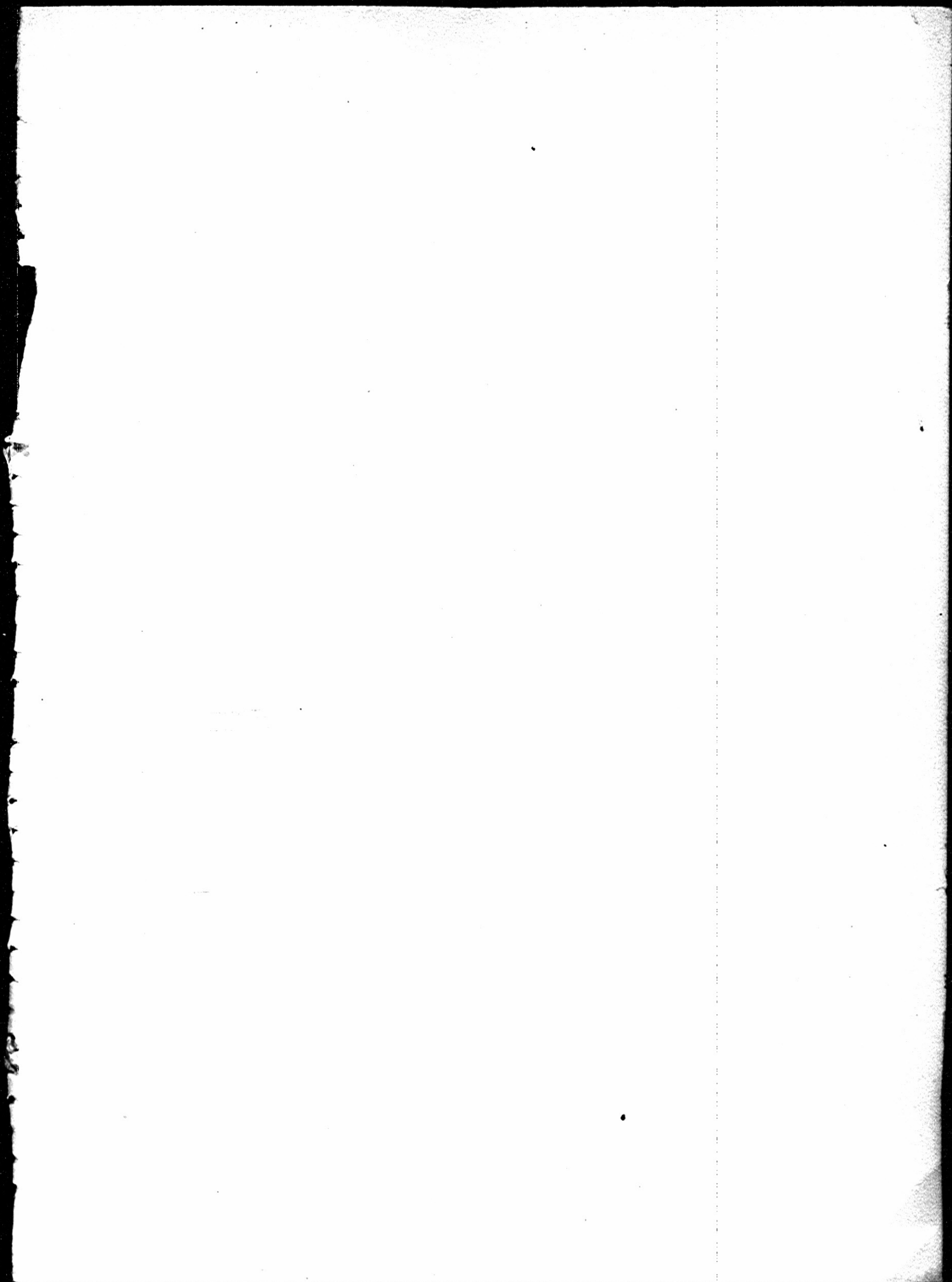
[Filed November 28, 1960]

NOTICE OF APPEAL

Notice is hereby given this 28th day of November, 1960, that Robert E. Wyngaard hereby appeals to the United States Court of Appeals for the District of Columbia from judgment of this Court entered on the 4th day of October, 1960 in favor of the defendant, William P. Rogers against said Robert E. Wyngaard, plaintiff.

/s/ JACK WASSERMAN
Attorney for Plaintiff
* * * * *

* * * * *



BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16149

ROBERT E. WYNGAARD, APPELLANT

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE
UNITED STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

CARL W. BELCHER,
NATHAN J. PAULSON,
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

MAY 10 1961

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Did the trial judge properly deny appellant's motion to convene a three judge court where the issue of substantiality had been clearly decided by the Supreme Court in prior cases?
2. Did the District Court properly hold that a conviction in New York City for "disorderly conduct" involving homosexual conduct in a public place was a "crime involving moral turpitude" under the immigration laws?

□

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*Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16149

ROBERT E. WYNGAARD, APPELLANT

v.

**ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE
UNITED STATES, APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On November 19, 1959, appellant filed a complaint in the District Court for declaratory judgment and review under the Administrative Procedure Act (5 U.S.C. 1001) and for an injunction against the appellee to compel the latter to stay deportation proceedings because: (1) The exclusion and deportation provisions in the Immigration and Naturalization Act relating to "crime involving moral turpitude" is unconstitutional and (2) the offense for which appellant was convicted in the State of New York is not a crime within the purview of the section.

Appellee, on April 28, 1960, filed a motion for summary judgment annexing thereto Exhibit A which consisted of the relative Immigration and Naturalization Service¹ file No. a-69072696. On May 4, 1960 appellant filed an application re-

¹ Hereinafter referred to as I. & N.

questing the convening of a Three-Judge District Court pursuant to 28 U.S.C. 2282 and 2284. On the same day appellant's cross motion for summary judgment and his opposition to appellee's motion for summary judgment were filed. On May 13, 1960, appellee filed an opposition to appellant's request for a Three-Judge Court. On June 1, 1960 the District Court (Walsh, J.) issued its findings of fact and conclusions of law and denied appellant's request for a Three-Judge Court. On October 4, 1960 the District Court (Holtzoff, J.) entered an order granting appellee's motion for summary judgment. An opinion in the case was filed on October 17, 1960. This appeal followed.

Appellant, a native of Holland, originally effected entry into the United States for permanent residence on April 2, 1948. From that date until May 13, 1957 when he was re-admitted to the United States as a returning resident alien he made several trips abroad. Prior to his last entry into the United States and specifically on April 4, 1952, he was convicted of petit larceny in the Court of Special Sessions of the City and County of New York. On April 17, 1955, in the City Magistrate's Court of the City and County of New York, Felony Court, he was convicted of "disorderly conduct" in violation of Section 722, subdivision 8, of the New York State Penal Law. He was charged on an information alleging that he and another male co-defendant, with intent to provoke a breach of peace while acting in concert did loiter in a public place for the purpose of soliciting men for crimes against nature or other lewdness and did there and then commit the following act:

* * * While standing at adjacent urinals each manipulating his naked penis, * * * did * * * step back from the urinals, faced each other, * * * [appellant's co-defendant] thereupon [* * * being observed to reach out with his right hand and manipulate the naked penis of * * *] [appellant] * * *, and then bend down and placed his mouth in the proximity of * * * [appellant's] * * * naked penis, the latter offering no resistance to the described acts of * * * [appellant's co-defendant].

The aforesaid act came within the specific proscription of the section of the penal law for which he was charged.

Deportation proceedings were instituted in 1957 and after due notice and a hearing before the United States Department of Justice I. & N. Service, appellant was found deportable upon the ground that at the time of his last entry into the United States he was excludable from this country under Section 212 (a)(9) of the I. & N. Act, 8 U.S.C. 1182(A)(9) which bars aliens who have been convicted of a "crime involving moral turpitude" and provides for their exclusion. The Immigration authorities determined that both of the criminal offenses, i.e., petit larceny and disorderly conduct, were "crimes involving moral turpitude" within the meaning of the exclusion provision of the immigration laws. Appellant's appeal to the United States Department of Justice, Board of Immigration Appeals was thereafter dismissed. He then instituted the proceedings hereinbefore referred to in the District Court.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act (8 U.S.C. 1251) provides:

(a) Any alien in the United States * * * shall upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 212(a)(9) of the Immigration and Nationality Act [8 U.S.C. 1182(a)(9)] provides:

Sec. 212(a) The following classes of aliens shall be excluded from admission into the United States:

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) * * *

Section 4 of the Act of September 3, 1954 [8 U.S.C. 1182(a)] provides:

Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18 (U.S.C.), by

reason of the punishment actually imposed * * * may on and after September 3, 1954 * * * be * * * admitted to the United States if otherwise admissible; *Provided*, That the alien has committed only one such offense.

Section 1, Title 18 U.S.C., provides:

Offenses classified.

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense.

Article 2 of the New York Penal Law provides:

Division of Crime. A crime is: 1. A felony; or 2. A misdemeanor. *Felony*. A "felony" is a crime which is or may be punishable by 1. Death; or 2. Imprisonment in a state prison. *Misdemeanor*. Any other crime is a "misdemeanor."

Section 722 of the New York Penal Law provides in part:

Disorderly conduct.

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;

SUMMARY OF ARGUMENT

The District Court properly denied appellant's motion for convocation of a three-judge court. The question presented was insubstantial because its unsoundness clearly resulted from previous decisions of the Court so as to foreclose the subject and leave no room for the inference that the question raised could be the subject of controversy.

The conviction for disorderly conduct in New York City was based upon homosexual activity in a public place. Under applicable decisions in the Second Circuit Court of Appeals this has been held to be a crime involving moral turpitude as interpreted under the immigration laws. The word "crime" must be considered in its broad sense as distinguished from Civil wrongs. The fact that a state "labels" an act under a different nomenclature for purposes of delineating jurisdiction within its several courts does not alter its inherent character.

ARGUMENT

I. The statute involved, i.e., 8 U.S.C. 1182(A)(9) does not fall within the "Void for Vagueness Doctrine". The trial judge properly denied appellant's application to convene a three-judge court

a. A single district judge has the duty to initially determine whether the complaint raises a substantial constitutional question

A single District Judge, upon motion made, has jurisdiction and the duty to determine whether a complaint raises a substantial constitutional question. If he determines that no substantial constitutional question is presented there is no basis for the convocation of a Three-Judge Court pursuant to 28 U.S.C. 2282 and 2284. Upon reaching this conclusion, the single District Judge then may and should proceed to dispose of the litigation. *Eastern States Petroleum Corp. v. Rogers*, 108 U.S. App. D.C. 63, 280 F. 2d 611 (1960).

The question of whether the constitutional question raised by the complaint is sufficiently substantial must be carefully weighed at the threshold by the Single District Judge to whom application is made. That judge may deny the application if the lack of substantiality appears either because the question is "obviously without merit" or because "its unsubstantiality so clearly results" from prior decisions "as to foreclose the subject". Only if the question remains "fairly open to debate" should a Three-Judge Court be convened. *California Water Service Co. v. Redding*, 304 U.S. 252, 254-56. Cf. *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

b. The complaint fails to raise a substantial constitutional question because prior court decisions foreclose the subject

The Supreme Court resolved the constitutional question presented here in *Jordan v. DeGeorge*, 341 U.S. 223 (1951). The only question presented is one of statutory construction, i.e. the interpretation of the term "crime" as it appears in the exclusion and deportation provisions of the Immigration law. Appellant predicates his attack upon the theory that the statutory standard of deportability (conviction of a crime involving moral turpitude) violates due process of law and is "void for vagueness" or "indefiniteness" because in a marginal or borderline case (which this is alleged to be) difficulty is encountered in applying the standard. Supreme Court decisions set forth the governing proposition relative to similar attacks upon criminal statutes. These provide that if a criminal statute has come to have a well enough known meaning so that "a standard of some sort" is afforded that gives reasonable guidance regarding the general class of offenses to which the statute is directed, it will not be struck down as too indefinite for constitutional purposes solely because "men may differ as to borderline applications," or even though "marginal cases could be put where doubts * * * arise." This basic proposition is particularly apt if the offense described in the statute is difficult to define "in all its applications" (and limitations on free expression are not involved). *Roth v. United States*, 354 U.S. 476, 491-2 (1957); *United States v. Harriss*, 347 U.S. 612, 617, 618 (1954); *United States v. Petrillo*, 332 U.S. 1, 7, 8 (1947); *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 342 (1952) (I.C.C. regulations implementing a criminal statute). And in *Winters v. New York*, 333 U.S. 507, 515, 518 (1948) the Supreme Court held the criminal statute to be void, but nevertheless affirmed the proposition set forth above. Phrases such as "restraint of trade", *Nash v. United States*, 229 U.S. 373 (1913) and "number of employees needed", *United States v. Petrillo*, *supra*, though tinged with uncertainty, have nevertheless successfully withstood constitutional attack and have been held not to invalidate the criminal statute as "void for vagueness". The Court noted in the *Winters* case, *supra*, that words such as indecent and disgusting

have even come to have a well known meaning "through long use in the criminal law" and though edged with "uncertainty" they are not unconstitutional for indefiniteness. It is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line" *Boyce v. United States, supra*. For constitutional purposes no more than a reasonable degree of certainty should be demanded. In line with the rationale of the Supreme Court cases cited, it becomes apparent that the Court, in *Jordan* considering the constitutionality of the phrase "crime involving moral turpitude", held that it was sufficiently definite a standard to be sustained as constitutional. 341 U.S. 229. This constitutional question was considered by the court independently and entirely apart from its consideration of the statutory construction issue therein involved i.e., whether the crime of conspiracy to defraud the United States of taxes is a crime involving moral turpitude within the meaning of the immigration law. The same view was taken in *Tseung Chu v. Cornell*, 247 F. 2d 929, cert. denied, 355 U.S. 892 (1957) where the Court of Appeals phrased the precise constitutional issue to be:

Does the phrase "Crime involving moral turpitude" have a sufficiently definite meaning to afford a constitutional standard for deportation?

In answering that question it declared:

We feel this point is best answered by the consideration of the precise point in *Jordan v. DeGeorge* * * *. There the Supreme Court said. * * *

It followed with quotations at full length from the decision and the court's treatment of the constitutional question in that case (341 U.S. 229-232) and concluded that it was bound by the "language and reasoning" of the Supreme Court. 247 U.S. 938-9.

The constitutional requirement does not require impossible standards of specificity. The test is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge, supra*; *Connally v. General Construction*,

269 U.S. 385 (1926); *Williams v. United States*, 341 U.S. 97 (1951). The challenged provision in the immigration statute meets the test. *Jordan v. DeGeorge* follows the cases which hold that the term "crime involving moral turpitude", as used in the immigration statute gives "a sufficiently definite warning" as to "the general class of offenses" which are "plainly within its terms", despite its lack of precision "in peripheral cases". This is apparent from the dissent in that case which argued to the contrary. 341 U.S. 232.

The statute does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite crimes. *Jordan, supra* p. 230. In *Jordan*, the Court predicated its ruling upon the constitutional issue, in some measure, upon the fact that the phrase "crime involving moral turpitude" has been applied as part of the immigration law more than sixty years and had been unhesitatingly applied by the Court in a 1933 decision.

The act of 1952 was a current codification of the immigration laws of the United States into a single comprehensive statute. The legislative history of the act discloses that Congress was well aware of the previous court and administrative applications of the term "moral turpitude" as well as the inherent difficulties encountered in applying it in borderline cases. S. Rep. #1515, 81st Congress 2d sess. (1950) at pp. 351-4. It discusses and summarizes a number of judicial and administrative constructions of the phrase. It was noted that a suggestion had been made that the statute should include "a listing of crimes and circumstances comprehended within the meaning of moral turpitude." It was also noted that "the courts have defined many classes that fall within the definition of that phrase." However, the subcommittee noted:

* * * that, although it might be desirable to have the crimes specifically set forth, difficulties might be encountered in getting a phrase that would be broad enough to cover the various crimes contemplated within the law and yet easier to comprehend than the present phrase.

The subcommittee chose to retain the phrase "moral turpitude" in the immigration law. Shortly after this report was published, the Supreme Court rendered its decision in *Jordan* upholding the constitutionality of the use of this phrase in the law. Congress then re-enacted this phrase into the current law.

In the light of the foregoing, it seems apparent that Congress considered the matter and found no better language to fit the purpose and was convinced that the phrase was sufficiently definite to be constitutional, even though there might be some difficulties encountered in applying the term in marginal or borderline cases.

c. There is no constitutional question raised by the complaint

Appellant attempts to persuade this Court that the offense to which he pleaded guilty was simply disorderly conduct, by inferring that a mere breach of the peace was involved. However, an analysis of the New York Penal law discloses that the statute involved is a broad divisible one containing eleven separate and distinct sections and subdivisions. Each subdivision stands alone and it is the act specified in each subdivision that is made punishable as tending to breach the peace and is denominated as disorderly conduct. The generic designation or name given an offense and made punishable by law should not be and actually is not material for the purposes of determining whether it involves moral turpitude within the meaning of the immigration law. It is the inherent nature of the act condemned as unlawful that is the controlling factor in its determination—not the "tag" that the statute places upon it. *United States ex rel Zaffarano v. Corsi*, 63 F. 2d 757 (2d Cir. 1933). In that case the court stated, p. 759:

* * * It is the specific criminal charge of which the alien is found guilty and for which he is sentenced that conditions his deportation, provided it involves moral turpitude. Obviously it must be quite immaterial that some other charge not involving moral turpitude may be called by the same generic name, as for example, assault in the second degree. * * *

It further held that it is "the inherent nature of the crime"—as defined in the statute and described in the record of conviction, consisting of the charge (indictment or information), plea, verdict and sentence—that controls the determination whether moral turpitude is involved. *Id.* 63 F. 2d 758, 9. An act that is intrinsically and morally wrong derives its turpitudinous nature therefrom and "not from being declared unlawful by the municipal law". *Tillinghast v. Edmead*, 31 F. 2d 81, 83 (1st Cir. 1929). *Cf. Ablett v. Brownell*, 99 U.S. App. D.C. 384, 389, 240 F. 2d 625, 627.

Putting the instant case in its proper posture, the question presented is whether the act for which appellant was convicted, namely "frequenting or loitering about a * * * public place soliciting men for the purpose of committing a crime against nature or other lewdness" and in fact committing an act of perversion in a public place, is an act turpitudinous in nature. The penal law of New York denounces this act by subdivision 8 though it is denominated as an offense tending to breach the peace and given the generic name of disorderly conduct by the introductory language of Section 722 of the law. As we read the law, the intent to breach the peace follows as a legal presumption from the doing of the act specified which we submit is one involving moral turpitude.

The Court of Appeals for the Second Circuit had no difficulty at arriving at this conclusion. In *United States v. Flores-Rodriguez*, 237 F. 2d 405, 406, the Court had no difficulty classifying the specific act done with the actual intent indicated in subdivision 8 of Section 722 as an offense involving moral turpitude when it stated that "homosexuals with exhibitionistic tendencies and other groups with lewd proclivities [are] similarly repugnant to the mores of society" and one who is "convicted of having solicited men in a public place to commit with him a homosexual act * * * is most emphatically not [conducting himself] in socially approved behavior in these United States," pp. 411, 2. This conclusion was reaffirmed by that court in *Babouris v. Esperdy*, 269 F. 2d 621, 623 (2d Cir. 1959), *cert. den.*, March 7, 1960, 28 L.W. 3259.

Putting aside for the moment the question of "labels" attached to characterizations by state legislatures for specific

fundamental reasons, there seems to be no question that the nature of the offense described in the record of conviction shows that it inherently involves "moral turpitude". Even prior to the *Florez* and *Babouris* decisions the courts have held lewdness to involve moral turpitude as defined by the immigration laws. *Lane ex rel Cronin v. Tillinghast*, 38 F. 2d 232 (1930, 1st Cir.). Cf. *Fitzgerald v. Landon*, 238 F. 2d 864 (1st Cir. 1956). So too have the administrative decisions held. *Matter of C*, 3 I. & N. Dec. 790 (1949); *Matter of R.*, 2 I. & N. 633 (1946) (indecent exposure deemed turpitudinous because under pertinent State law it necessarily involved "a degree of lewdness").

Appellant's offense is not within any penumbra area for constitutional purpose insofar as "moral turpitude" is concerned. His is no borderline case nor is it marginal in the application of the term. A pertinent discussion of the entire legislative history of the term appears in the comprehensive report that preceded the enactment in 1952 of the current immigration statute. S. Rep. No. 1515, 81st Cong. 2d sess. (1950), at p. 350-3. There, the report pointed out that: In the 1891 Act, the term used was "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." The 1903 immigration statute changed the phraseology by omitting the words, "or other infamous crime". And, the Acts of 1907, 1910 and 1917 kept the words "or misdemeanor" in the statute. Moreover, the report noted that an objection had been voiced in one of the subcommittee's hearings by an immigration inspector who cited "instances where the purpose of the law [in using the term, "moral turpitude" for exclusion and deportation purposes] had been ignored by including petty crimes, such as theft of a newspaper". The inspector suggested "a statute of limitations on petty crimes." Thus, it clearly appears that when the current immigration statute was enacted in 1952, Congress understood that offenses which inherently involve moral turpitude have not been regarded as excepted from application of the term, "moral turpitude", as used in the immigration law simply because of their petty degree. And, in this connection, we note that the "petty offense" provision enacted in the Act of

September 3, 1954, 8 U.S.C. 1182(a), of which appellant seeks to avail himself, also shows Congress' understanding that petty offenses involving moral turpitude are within the statutory proscription.

II. The offense denominated "Disorderly Conduct" under New York law, of which appellant was convicted, consisting of the act of loitering in a public place soliciting men for the purpose of committing a crime against nature or other lewdness, is a crime within the meaning of the Immigration Law of the United States

The crux of the issue here is whether Congress meant to use the term, "crime", in the immigration law in its broad commonly understood sense to encompass all offenses against the State that are made punishable by law, and are criminally prosecuted to vindicate the *public interest*—as distinguished from what are commonly understood to be civil matters brought to vindicate *private interest*. Since, in the immigration field, Congress was concerned with the varying legal procedures and criminal concepts that prevail in *all* the foreign countries of the world, as well as the United States, it seems obvious that Congress meant to use the term, "crime", in its broad commonly understood meaning when it included the term in the exclusion and deportation provisions of the immigration law of the United States. However, we concede an error was long made in the Immigration and Naturalization Service administrative interpretation that the New York State Courts' carving out the "petty offense" area involved here for irrelevant purposes of its own, controlled Congress' use of the term, "crime", in the immigration law of the United States. But this error may be and was corrected in the light of the *Flores* and *Barbouris* opinions.

Our contention is that Congress, in its use of the language "crimes involving moral turpitude," did not intend to make the meaning of the word "crime" turn on varying state-law labels attached to specific public offenses, but rather used the word "crime" in its generic sense to denote all public as opposed to private wrongs, prosecutable and punishable by public authority, and involving punitive as opposed to remedial sanctions. Thus, the law is one of uniform application

throughout the United States, not dependent upon whatever labels the 50 states choose to attach to public wrongs, be they "crimes," "offenses," or "violations" of other penal statutes or ordinances.

We submit that *Flores* and *Babouris*, *supra*, the two decisions of the Court of Appeals for the Second Circuit, determining this issue contra to appellant's contention are decisive. The reasoning therein is most persuasive in principle and this Court should follow the Second Circuit decisions on this issue. In *Flores* the Court stated (p. 409):

We cannot so readily concur, for such an all-inclusive commonly used word as the word "crime"¹ in an Act of Congress should not be necessarily circumscribed by restrictive holdings of the New York State Courts defining the jurisdictional limits of New York inferior courts of criminal jurisdiction. *Cf. Jerome v. United States*, 1943, 318 U.S. 101, 63 S. Ct. 483, 87 L. Ed. 640, reversing, 2 Cir., 130 F. 2d 514.

Congress has expressed its disapproval of the type of behavior for which defendant was convicted in New York. For example, under the District of Columbia Code, § 22-2701, defendant's misconduct would have been punishable as a misdemeanor. *Kelly v. United States*, 1952, 90 U.S. App. D.C. 125, 194 F. 2d 150; *Bicksler v. United States*, D.C. Mun. App. 1952, 90 A. 2d 233. To hold that the peculiar New York definition of the word "crime" controls the interpretation of the

¹ See Webster's New International Dictionary (1927 Ed.) at Page 522 which defines the word "crime" as follows:

"1. An omission of a duty commanded, or the commission of an act forbidden, by a public law. The term crime is hardly a technical term at the common law, but is essentially defined in many of the penal codes in the United States, as in the New York code, as 'an act or omission forbidden by law and punishable upon conviction by (1) death; or (2) imprisonment; or (3) fine; or (4) removal from office; or (5) disqualification to hold or enjoy any office of trust, honor or profit under the statute; or (6) other penal discipline.' A crime is a violation of a public right and may also involve a violation of the rights of an individual. *Crime includes all grades of public offenses*, which at the common law are often classified as treason, felony, and misdemeanor. * * * [Italics, the Court's.]

Immigration Act would lead to an anomalous result: an alien convicted for the same misconduct as defendant in the District of Columbia or in many of the states² would be excludable under subsection (e); but because this misconduct is characterized as an "offense" and not a "crime" in New York defendant would not be so excludable. We do not believe Congress intended such a result.

And in *Babouris*, the Court stated (p. 622):

A Special Inquiry Officer of the Immigration and Naturalization Service, after a hearing, ordered appellant to be deported on the ground that he had been after entry "convicted of two crimes involving moral turpitude" within the meaning of section 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1251(a)(4). The Officer rejected appellant's argument that a violation of section 722 is an "offense" and not a "crime" as a matter of New York law, and therefore is not a "crime" as that word is used in the deportation statute. The Board of Immigration Appeals sustained the ground of deportation and dismissed appellant's appeal from the decision of the Special Inquiry Officer.

In denying appellant's motion Judge Bicks relied upon *United States v. Flores-Rodriguez*, 2 Cir., 1956, 237 F. 2d 405, 409, in which this court held that a violation of section 722, subd. 8 is a "'crime of misdemeanor' involving moral turpitude" for purposes of the alien exclusion statute, 8 U.S.C.A. § 136 (1946 ed.), now super-

² See e.g., Conn. Gen. Stat., 1949 Rev., §§ 8873, 8877, 8569, 8548; Iowa Code 1954 § 725.1, I.C.A.; Mass. G.L. c. 272, § 16; Rev. Stat. of N.J. 1937, Title 2, c. 140-1, now N.J.S.A. 2A: 115-1; Purdon's Pennsylvania Statutes Annotated, Title 18, § 4502; Vermont Statutes, Rev. 1947, §§ 8490, 8611, 8615. See also *State v. Wimer*, 1918, 30 Del. 114, 103 A. 752; *State v. Bauguess*, 1898, 106 Iowa 107, 76 N.W. 508; *Commonwealth v. Hamilton*, 1931, 237 Ky. 682, 36 S.W. 2d 442; *Commonwealth v. Cummings*, 1930, 273 Mass. 229, 173 N.E. 506. The particular kind of conduct involved here is variously defined in the criminal statutes as lewdness, indecent exposure, obscenity, disorderly conduct, or sodomy, and variously punishable as a "felony" or a "crime" or a "misdemeanor" or an "offense".

seded by 8 U.S.C.A. § 1182. The appellant in that case cited New York cases holding that the offense in issue was neither a "crime" nor a "misdemeanor," but the court found that the cited decisions had been concerned defining the jurisdiction of inferior magistrates' courts, as opposed to those having wider jurisdiction over criminal conduct. It noted that the meaning of a commonly used word such as "crime" in an Act of Congress should not be unnecessarily circumscribed by New York decisions defining the jurisdictional limits of inferior state courts. This court did not believe that Congress had intended that aliens guilty of identical misconduct should be excludable if convicted in the District of Columbia or in many of the states, where such conduct is punishable as a felony, crime or misdemeanor, but should not be excludable if convicted in New York, where such conduct is described as an offense.

* * * *

[1] Although it may be that deportation statutes should be more strictly construed than exclusion statutes, there is no merit to appellant's contention that an alien having the same record of misconduct would be eligible for admission to the United States under section 212(a)(10). Such an alien would be ineligible under section 212(a)(9), 8 U.S.C.A. § 1182(a)(9), which provides that "Aliens who have been convicted of a crime involving moral turpitude * * *" shall be excluded from admission. This provision replaced that construed in *Flores-Rodriguez, supra*, and is identical in all respects here material. The fact that the word "offense" appears in 8 U.S.C.A. § 1182(a)(10) does not evidence any intent by Congress to limit the meaning of the word "crime" in the preceding subparagraph.

United States v. Flores-Rodriguez, supra, was correctly decided and the principles of construction on which it rests are equally applicable here. It is not to be supposed that Congress intended an alien's deportability to be determined by the various classifications of misconduct evolved by the states for jurisdictional or

other internal application. As the court said in *People ex rel. Erway v. MacAffer*, *supra* [282 App. Div. 287, 123 N.Y.S. 2d 206], "It is true that disorderly conduct has all the attributes of a crime except that of nomenclature, * * * and it is difficult to defend with logic the proposition that such an offense, which may lead to six months imprisonment, is not a crime."

However, we wish to emphasize what we regard to be the basic error in appellant's argument, where he contends that whether conduct is criminal in a State is to be determined by the State law, not by federal law, and that a primary requisite of deportability is that the alien must have committed an act which is a crime at the place where the offense occurred. If he means that the act of which the alien is convicted must be denounced as unlawful by the State law as an offense against the State, to which the State law annexes a punishment, and which the State prosecutes in its own name to vindicate the public interest, then we agree.

But that does not reach the true issue here. There is no dispute that plaintiff was convicted in a New York State court of limited criminal jurisdiction. We believe the Court's rationale in *Flores-Rodriguez* and *Babouris* is that: The law violator who is duly convicted of the offense in question is subject to 6 months imprisonment under the New York State Penal Law. Persons duly convicted of the identical offense elsewhere come within the proscription of the excluding provision in the immigration law because the State law there does not peculiarly carve out a "petty offense" criminal jurisdiction area for its own particular purposes. Such a word as "crime" which has a broad commonly understood meaning, in an Act of Congress should not be unnecessarily circumscribed by New York decisions not concerned with the precise point of its meaning as used in the immigration statute.

None of the New York State cases cited in appellant's brief purports to regard violations of Section 722 of the New York Penal Law to be *civil* in nature. At the minimum, these decisions regard offenses under Section 722 to be quasi-criminal in nature. Such a classification does not remove these offenses from the category of "crime" in its broad commonly understood

meaning. The Supreme Court early held in *Wing v. United States*, 163 U.S. 228, 237 (1896), that under our system of jurisprudence, a matter punishable by imprisonment connotes a requirement for regular judicial proceedings to establish guilt. Therefore, the reference in appellant's brief to "civil non-support, paternity proceedings and entire run of offenses heretofore considered non criminal" is completely irrelevant to the crucial issue here.

A view analogous to that taken by the Second Circuit in *Flores-Rodriguez* and *Babouris*, was taken by the Court of Appeals for the Ninth Circuit in *Arrellano-Flores v. Hoy*, 262 F. 2d 667, 668 (1958). With regard to the word, "convicted", as used by Congress in the immigration statute, the Ninth Circuit there stated:

While one cannot close one's eyes to the state's statutes and what transpired in the state's proceedings, we are inclined to the belief that perhaps here Congress intended to do its own defining rather than leave the matter to the variable state statutes.

Moreover, as noted above, Congress in 1954 enacted an ameliorating "petty offense" provision which relieves from excludability an alien who has been convicted of only one such "petty offense." In 18 U.S.C. 1 Congress had signified its understanding that the term, "petty offense," is within the general category of "crime" for federal criminal prosecution purposes.

For all of the foregoing reasons we urge this Court to adopt the Second Circuit's view contained in *Flores-Rodriguez* and *Babouris*.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

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